

Pursuant to Ind. Appellate Rule 65(D),
this Memorandum Decision shall not be
regarded as precedent or cited before any
court except for the purpose of
establishing the defense of res judicata,
collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

ELLEN M. O'CONNOR
Marion County Public Defender Agency
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

GARY DAMON SECREST
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

ERIC MCGEE,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 49A02-0612-CR-1088
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Jane Magnus-Stinson, Judge
Cause No. 49G06-0510-FB-183566

October 25, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Eric McGee (“McGee”) appeals from his conviction, after a jury trial, of robbery with a deadly weapon, as a class B felony,¹ and carrying a handgun without a license, as a class A misdemeanor.²

We affirm.

ISSUES

1. Whether the trial court abused its discretion by admitting the alleged hearsay statement of an unidentified female witness.
2. Whether McGee’s sentence is inappropriate.

FACTS

At approximately 11:30 p.m. on October 22, 2005, Daniel Young and his friends arrived at the Vogue nightclub in Broad Ripple. Young emerged for some fresh air at approximately 3:30 a.m. and walked around the block. As Young spoke on his cell phone, two very young black men “just ran up as fast as they could and just shoved [him] to the ground as hard as they could” (Tr. 52). Young landed on his side and rolled into a seated position. He asked, “[W]hat the hell are you doing . . . why would you push me down[?]” (Tr. 59).

Young observed that one of the men was approximately 5’7” and wearing a grey sweatshirt with red accents and dark blue or black jeans. The other man, later identified as McGee, was clean-shaven and approximately 5’10” or 5’11”. McGee wore a “black

¹ Ind. Code § 35-42-5-1.

² Ind. Code § 35-47-2-1.

hooded sweatshirt pulled down tight around the face,” blue jeans, and a distinctive pair of sneakers, which Young recognized as “[19]93 Air Jordans.” (Tr. 57). Amid a great deal of yelling, McGee drew a black nine-millimeter semi-automatic handgun from the pocket of his sweatshirt, pointed it at Young’s face and chest, and demanded his wallet and cell phone. Young surrendered his two cell phones, wallet, cash, and debit card to McGee’s accomplice. The two men then fled in different directions – McGee to the south toward Paxton Street, and his accomplice to the east.

Young rose to his feet and ran northbound on College Avenue to find the police. He ducked through a parking lot and alley near the Vogue, all the while shouting that he had been robbed. Soon thereafter, Young encountered Sergeant Greg Gehring of the Indianapolis Police Department and provided descriptions of the robbers. Meanwhile, Sergeant Steven Cheh and Lieutenant Christopher Mosier of the Indianapolis Police Department were parked in their squad cars in a parking lot in the 6200 block of College Avenue across from the Vogue. They had seen Young “running north [on College Avenue] . . . yelling that he’d been robbed.” (Tr. 155). Sergeant Cheh looked to the south and saw a black male – later identified as McGee – “jog[ging]” southbound, wearing a dark hooded sweatshirt with the hood down around his neck and blue jeans. (Tr. 155, 221). Lieutenant Mosier drove to the north trying to find Young, while Sergeant Cheh proceeded south after McGee.

As Sergeant Cheh followed McGee, an unidentified woman, possibly of Indian descent, flagged him down. The woman “appeared very excited,” and was “flinging [and] flailing her arms” and shouting “very loud[ly].” (Tr. 227, 228, 229). She “almost

stepped out” into traffic, and Sergeant Cheh nearly struck her with his vehicle. The woman pointed at McGee and shouted, “[T]he black man just robbed the white man.” (Tr. 233). McGee turned and looked at Sergeant Cheh and the unidentified woman as they spoke. Sergeant Cheh advised the woman to stay where she was and continued to pursue McGee. Sergeant Cheh then observed McGee approach a parked blue Ford Escape, pause momentarily beside it, and then walk away briskly. At the intersection of Paxton Street and College Avenue, Sergeant Cheh pulled his squad car alongside McGee and ordered him to stop; McGee complied.

McGee was apprehended within minutes of the robbery. Sergeant Cheh radioed dispatch to alert the other officers that he had apprehended a possible suspect in the 700 block of Paxton Street. Soon thereafter, Lieutenant Mosier arrived at the scene and took custody of McGee. Sergeant Cheh walked back to the parked blue Ford Escape and searched the surrounding area. He found a black nine-millimeter semi-automatic handgun underneath the vehicle.

Thereafter, Sergeant Gehring transported Young to the 700 block of Paxton Street. Once at the scene, Young immediately identified McGee as one of the robbers. McGee was arrested for robbery and on two outstanding warrants. A subsequent test of the weapon yielded no fingerprints. McGee’s accomplice was never apprehended; nor was Young’s stolen property ever recovered. Sergeant Cheh returned to the area in which he had left the unidentified woman, but she was no longer at the scene.

On October 26, 2005, the State charged McGee with robbery with a deadly weapon, as a class B felony; and carrying a handgun without a license, as a class A

misdemeanor. After a mistrial at the first trial setting, McGee's jury trial was reset for October 23, 2006. Before trial, the trial court conducted a hearing regarding McGee's motion in *limine* requesting that the trial court bar Sergeant Cheh from testifying as to the alleged hearsay statement of the unidentified woman. The trial court denied the motion, finding that the woman's testimony could be admitted under either the present sense impression or the excited utterance exceptions to the hearsay rule. During the trial, the defense objected to Sergeant Cheh's testimony regarding the unidentified woman's statement; the trial court overruled the objection.

After both sides presented their cases, the jury found McGee guilty on both counts. On November 1, 2006, the trial court imposed a twelve-year sentence on the robbery conviction, and a one-year sentence on the handgun conviction, to be served concurrently, for an aggregate sentence of twelve years.

DECISION

1. Admission of Evidence

The decision to admit or exclude evidence falls within the sound discretion of the trial court, and we review that decision only for abuse of discretion. *Gayden v. State*, 863 N.E.2d 1193, 1195 (Ind. Ct. App. 2007). We will not reverse the trial court's decision unless it represents a manifest abuse of discretion that results in the denial of a fair trial. *Agilera v. State*, 862 N.E.2d 298, 302 (Ind. Ct. App. 2007). An abuse of discretion occurs when the decision is clearly against the logic and effect of the facts and circumstances before the trial court. *Id.*

McGee first argues that the trial court erred by admitting testimony regarding the unidentified woman's statement. Specifically, he argues that "there were insufficient facts to establish . . . a foundation" for either the present sense impression or the excited utterance exceptions to the hearsay rule. McGee's Br. 8.

Hearsay is a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ind. Evidence Rule 801(c). Hearsay is generally not admissible at trial pursuant to Indiana Evidence Rule 802. In order for a statement to be admitted under Indiana Rule of Evidence 803(1) – the exception for a present sense impression – the following elements must be shown: (1) a material event, condition or transaction; and (2) a statement made by a declarant while perceiving the event, condition or transaction, or immediately thereafter.

Likewise, for a statement to be admitted as an excited utterance under Indiana Rule of Evidence 803(2), the following elements must be shown: (1) a startling event; (2) a statement made by the declarant while under the stress of excitement caused by the event; and (3) that the statement relates to the event. Admissibility turns on "whether the statement was inherently reliable because the witness was under the stress of an event and unlikely to make deliberate falsification." *Davenport v. State*, 749 N.E.2d 1144, 1148 (Ind. 2001).

The trial court preliminarily ruled that depending upon the evidentiary foundation established by the State, the unidentified woman's statements were admissible hearsay under either of the aforementioned exceptions to the hearsay rule. Apparently, the State

laid a foundation for admissibility under the present sense impression exception to the hearsay rule. The record indicates that immediately after seeing Young run by shouting that he had been robbed, Sergeant Cheh observed a man running in the opposite direction and gave chase. As Sergeant Cheh pursued the man, an unidentified woman almost stepped out into traffic, nearly stepping into the path of his vehicle. The woman “appeared very excited,” “flinging [and] flailing her arms,” and shouting “very loud[ly],” (Tr. 227, 228, 229); she then blurted, “[T]he black man just robbed the white man.” (Tr. 233). The woman identified the young man running down the street as the robber. Sergeant Cheh never lost sight of the fleeing subject, who was later identified as McGee.

Based upon the foregoing facts, we find no abuse of discretion stemming from the trial court’s conclusion that the unidentified woman made her statement to Sergeant Cheh (1) immediately after perceiving McGee rob Young at gunpoint; and/or (2) while she was still under the stress of witnessing said robbery. We find no error from the trial court’s ruling that the unidentified woman’s statement was admissible under the present sense impression exception to the hearsay rule.

Next, McGee argues that because the unidentified woman did not testify at trial, the introduction of her statement through Sergeant Cheh’s testimony violated the Confrontation Clause of the Sixth Amendment. The State responds that introduction of the statement did not implicate the Confrontation Clause, and further, that the admission of the statement constituted harmless error in light of the other evidence establishing McGee’s guilt.

“Any hearsay which is permitted under the rules of evidence . . . is also subject to the defendant’s right ‘to be confronted with the witnesses against him’ under the Sixth Amendment to the United States Constitution.” *Crawford v. Washington*, 541 U.S. 36, 38 (2004). *Crawford* stands for the proposition that testimonial out-of-court statements may be admitted in a criminal trial only if the witness is unavailable and the defendant has had a prior opportunity to cross-examine the witness. *Id.* at 38.

Simply stated, the unidentified woman’s statement was introduced at trial to identify McGee as the man who robbed Young at gunpoint. The statement, although not the product of police interrogation, was indisputably testimonial in nature. This fact notwithstanding, the State argues that denial of the right of confrontation is harmless error where the evidence supporting the conviction is so convincing that a trier of fact could not have found otherwise. *Garner v. State*, 777 N.E.2d 721, 725 (Ind. 2002).

Specifically, the State contends that Young’s on-scene identification and subsequent testimony against McGee established beyond a reasonable doubt that McGee robbed Young. Errors in the admission of evidence, including hearsay, are to be disregarded as harmless unless they affect the substantial rights of a party. *Mathis v. State*, 859 N.E.2d 1275, 1280 (Ind. Ct. App. 2007).

In determining whether an evidentiary ruling has affected a defendant’s substantial rights, we assess the probable impact of the evidence on the factfinder. Moreover, the admission of hearsay is not grounds for reversal where it is merely cumulative of other evidence admitted. ‘The improper admission of evidence is harmless error when the conviction is supported by substantial independent evidence of guilt as to satisfy the reviewing court that there is no substantial likelihood that the questioned evidence contributed to the conviction.’

Id. (Internal citations omitted).

Young testified that he was robbed by two men, one of whom pointed a black nine-millimeter semi-automatic handgun at his face and chest. He testified further that the gun-wielding robber was a young black male, approximately 5'10" or 5'11" in height, who wore a black hooded sweatshirt, blue jeans, and Nike Air Jordan sneakers issued in 1993. Shortly after the robbery, Sergeant Cheh apprehended McGee as he fled the scene of the robbery. When McGee was apprehended, he was wearing a black hooded sweatshirt, jeans, and the distinctive pair of Nike Air Jordan sneakers. Young positively identified him as the gun-wielding robber. Sergeant Cheh searched the area in which McGee had briefly paused as he fled and found a black nine-millimeter semi-automatic handgun matching Young's description of the gun used in the robbery.

Based upon the foregoing, we conclude that absent the unidentified woman's statement to Sergeant Cheh, the evidence supporting McGee's conviction of robbery was sufficiently convincing that the trier of fact would not have found otherwise. Thus, we conclude that the introduction into evidence of the unidentified woman's statement through Sergeant Cheh's testimony did not create error and, at most, constituted harmless error.

2. Sentence

Finally, McGee argues that his sentence is inappropriate in light of the nature of the offense and his character. Specifically, he argues that "the robbery here was not particularly heinous" and that Young "did not testify that he suffered injury" when he was thrown to the ground. McGee's Br. 17. Further, he argues that the twelve-year

sentence imposed by the trial court is inappropriate³ given his youthful age⁴ at the time of sentencing and the hardship to his young daughter and supportive family.

Pursuant to Indiana Appellate Rule 7(B), we may revise a sentence authorized by statute if, after due consideration of the trial court's decision, we find that the sentence is inappropriate in light of the nature of the offense and the character of the offender. "[A] defendant must persuade the appellate court that his or her sentence has met the inappropriateness standard of review." *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind. 2007).

Our review of the nature of the offense reveals that after McGee and another man threw Young to the ground, McGee trained a nine-millimeter semi-automatic handgun on Young's face and chest and demanded that he surrender his valuables. In our review of the character of the offender, we observe that as a juvenile, McGee was adjudicated a delinquent for resisting law enforcement as a class D felony; however, this adjudication does not take into account several other contacts with the criminal justice system (including prior arrests for class A misdemeanor criminal conversion and auto theft as a class D felony) where the charges were later dismissed. As an adult, McGee was charged with auto theft as a class D felony and carrying a handgun without a license as a class A

³ Pursuant to Indiana Code section 35-50-2-5, the advisory sentence for a class B felony is ten years. Indiana Code section 35-50-3-2 states, "A person who commits a Class A misdemeanor shall be imprisoned for a fixed term of not more than one (1) year"

⁴ McGee was nineteen years-old at the time of the sentencing hearing.

misdemeanor.⁵ Just four months later, after being charged and released on his own recognizance, McGee committed the instant offense. We note further that McGee has twice violated the terms of his court-ordered probation and does not seem inclined to reject criminal behavior. We agree with the trial court’s assertion that McGee “appears to be somewhat of a veteran of the [criminal justice] system.” (Tr. 403).

After due consideration of the trial court’s decision, we conclude that McGee’s enhanced sentence of twelve years is not inappropriate in light of the nature of the offense and the character of the offender.

Affirmed.

KIRSCH, J., and MATHIAS, J., concur.

⁵ On the eve of his jury trial, McGee was convicted of these offenses pursuant to a guilty plea.